



GAO

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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: e-LYNXX Corporation--Costs

File: B-292761.2

Date: August 12, 2004

Anthony W. Hawks, Esq., for the protester.

Roy E. Potter, Esq., and Jennifer R. Seifert, Esq., Government Printing Office, for the agency.

Henry J. Gorczycki, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. A protester's request for reimbursement of attorney fees based on an assertion that the protester had an oral agreement with its in-house general counsel permitting him to work on the protest as outside legal counsel, on a contingency-fee basis, is denied where there is no contemporaneous evidence to support the claimed oral agreement; where the general counsel submitted his filings on the protester's letterhead, and signed those filings as an officer of the firm, not as outside counsel; and where the protester paid the general counsel his salary as an employee during the time he was working on the protest.

2. A protester's salary costs for the time an employee devoted to pursuing a protest to our Office are reimbursable where the record shows that the employee spent the time claimed pursuing the protest, the amount of the time was reasonable, and the cost of the employee's time to the protesting firm can be calculated with reasonable accuracy. Where a salaried employee worked more than 40 hours per week, but is not compensated for time worked in excess of 40 hours, reimbursable protest costs are determined based on the proportionate share of the employee's weekly salary attributable to work on the protest, and not on the employee's standard hourly rate.

DECISION

e-LYNXX Corporation requests that we recommend the amount it should be allowed to recover from the Government Printing Office (GPO) for attorney fees associated with filing and pursuing its protest in e-LYNXX Corp., B-292761, Dec. 3, 2003, 2003 CPD ¶ 219. As discussed below, we recommend that e-LYNXX be reimbursed \$11,142.19 for the time spent on its protest by its in-house attorney.

In our prior decision, we sustained e-LYNXX's protest because the agency's source selection decision was unreasonable in that it failed to meaningfully consider e-LYNXX's lower quotation price and because the selection official lacked a sufficient understanding of the agency's requirement to perform a rational price/technical tradeoff. Additionally, the record did not contain sufficient evidence to establish certain disputed terms of e-LYNXX's quotation, which were identified during oral presentations, but not adequately documented. We recommended that the agency reopen the competition, establish the content of quotations by obtaining either oral or written submissions, conduct a new evaluation and source selection decision, and reimburse e-LYNXX its costs of filing and pursuing its protest.

In its first of two requests for reimbursement filed with the agency, e-LYNXX identified three categories of protest costs: (1) employee labor time totaling \$332.48, for an assistant to the company's president; (2) out-of-pocket expenses totaling \$2,390.47, for travel and lodging, transcript costs and the costs of materials and copying; and (3) attorney fees totaling \$36,560. The agency promptly paid e-LYNXX the sum of \$2,722.95 for the employee labor time and out-of-pocket expenses, but objected to paying the protester's claim for attorney fees on the basis that no such fees were incurred.

With respect to the attorney fees in its initial request for reimbursement, e-LYNXX explained that it was represented in its protest by its in-house general counsel (who is also a vice-president for the firm), but claimed that its general counsel was acting as an outside counsel for this protest. The request stated that the company's general counsel maintains a private law practice that includes representing other firms before the GPO Board of Contract Appeals, and in bid protests, and explained that its general counsel usually supervised company litigation activities, rather than provide them himself. As a result, the company concluded that serving as counsel for this protest was outside the scope of the general counsel's employment, as doing so would consume a significant amount of time beyond his normal work hours. Thus, the company claims that it orally agreed that its in-house general counsel could represent it:

on the same basis that he represents clients in other GAO or GPO protests, except that he would do so on a pro bono basis with the condition that he would be entitled to collect any attorneys' fees recommended by the GAO in the event that the Bid Protest was sustained.

Request for Reimbursement of Protest Costs, exh. 4, Declaration of e-LYNXX's President, at 1-2.

In GPO's view, this agreement between e-LYNXX and its general counsel—if it existed at all, and GPO argues it did not—did not obligate e-LYNXX to pay any legal fees

whatsoever to its general counsel. Thus, as indicated above, GPO concluded that e-LYNXX did not incur attorney's fees in pursuing its protest.¹

In response to GPO's objections, and by letter dated January 28, 2004, e-LYNXX filed an alternative cost claim with the agency seeking recovery of the salary costs for the time its general counsel spent pursuing the protest—i.e., 182.8 hours, at a claimed cost of \$13,664.30. This alternative claim stated that e-LYNXX was not conceding the question of whether it could orally retain its general counsel on a contingency fee basis, as it initially argued, and advised GPO that it would request our Office to decide the matter.

By letter dated January 30, GPO promptly rejected the alternative claim. The agency argued that since e-LYNXX itself agreed that the services performed by its general counsel were outside the scope of his employment with the company, the company had no obligation to pay its general counsel as an employee for these activities, and thus could not properly be reimbursed for these costs. On February 6, e-LYNXX filed its request for reimbursement with our Office.

As indicated above, CICA authorizes our Office to recommend that a protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 31 U.S.C. § 3554(c)(1)(A). The underlying purpose of CICA's provision relating to the reimbursement of protest costs is to relieve protesters with valid claims of the financial burden of vindicating the public interest that Congress seeks to promote. TRS Research—Costs, B-290644.2, June 10, 2003, 2003 CPD ¶ 112 at 3; E&R, Inc.—Costs, B-255868.2, May 30, 1996, 96-1 CPD ¶ 264 at 2. The amount claimed may be recovered to the extent that the claim is adequately documented and is shown to be reasonable. TRS Research—Costs, *supra*.

¹ Initially, the agency also objected to paying attorney fees on the basis that our prior decision recommended reimbursement of the protester's costs of filing and pursuing the protest, but did not specifically identify attorney fees. The Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(c)(1)(A) (2000), states, in pertinent part that, when sustaining a protest, our Office may recommend that the contracting agency pay the protester's costs of "filing and pursuing the protest, including reasonable attorneys' fees." Although our prior decision did not include the phrase "including reasonable attorneys' fees," the decision did recommend reimbursement of the protester's costs of filing and pursuing the protest. As explained in a conference call with the parties after this matter was raised with our Office, the wording in our decision was a matter of style and did not reflect a substantive determination that the protester should not be reimbursed any actual and reasonable attorneys' fees incurred in filing and pursuing its protest. Therefore, reimbursement of reasonable costs incurred for the services of an attorney in filing and pursuing the protest is covered by our recommendation. After the conference call, the agency did not pursue its earlier objection.

For the reasons set forth below, we find that the record here does not support a conclusion that e-LYNXX incurred outside attorney fees through the claimed oral agreement with its general counsel. We do find, however, that e-LYNXX incurred salary costs for the work performed by its general counsel, although we calculate those costs to be somewhat lower than e-LYNXX claims.

e-LYNXX's contention that its general counsel was representing the company as outside counsel during the protest is based on a claimed oral agreement for which the company provides no contemporaneous evidence. Although e-LYNXX states that the agreement was made prior to filing its protest on August 26, 2003, e-LYNXX made no mention of any such agreement until December 22, approximately 2 weeks after the date of our decision sustaining the protest and recommending reimbursement of protest costs.

We think the contemporaneous evidence in the record, on balance, tends to contradict the claimed arrangement. In support of its claims, e-LYNXX submits sworn declarations from its general counsel, its president and chief executive officer, and its chief operating officer, attesting to the existence of the agreement. In addition, the time records provided by the general counsel detailing his effort on this matter specifically identify the time spent, and the work performed for each day; the level of detail provided suggests that records were maintained contemporaneously, rather than at the conclusion of the protest. On the other hand, we recognize that the time records might also have been maintained in order to support a claim for the general counsel's salary costs. Weighing against the claimed agreement is the fact that, throughout the previous protest, submissions to our Office were set forth on company letterhead, and were signed by the company's general counsel under the titles of either "General Counsel" or "Vice President and General Counsel." Likewise, the general counsel represented e-LYNXX at the hearing conducted by our Office as vice president and general counsel of the firm. Moreover, although e-LYNXX alleged that the oral agreement called for its general counsel to provide his services during the protest on a pro bono basis, wage and tax records submitted here show that the general counsel was compensated by e-LYNXX as a full-time employee throughout the protest process, despite its claim that these services were beyond the scope of his regular employment and contrary to evidence in the record that he did not work fulltime on non-protest tasks.

In our view, the evidence supporting this claimed oral agreement for the company's general counsel to provide his services as an outside attorney acting on a contingency basis is not sufficient to support a conclusion that this agreement existed. In addition, this evidence is not sufficient to support a conclusion that this agreement overrides the employer-employee relationship for which there is considerably more evidence in the record. Instead, we think the evidence shows that e-LYNXX's general counsel acted as, and was compensated as, a salaried employee for work performed on the protest--and not as if an agreement to perform as outside counsel had been executed. Since we find insufficient evidence of the

alleged oral agreement to support the instant request, we do not reach the dispute between GPO and e-LYNXX about whether the alleged oral agreement here resulted in reimbursable contingent attorneys' fees.²

Despite our conclusions above, we think much of the same evidence that undercuts the claimed contingency fee arrangement demonstrates that e-LYNXX incurred salary costs for its general counsel related to the company's pursuit of its protest. In addition, we think the claimed hours appear reasonably related to the effort involved. Although GPO elected not to challenge the reasonableness of the hours or costs claimed, we think e-LYNXX's request for reimbursement slightly overstates its claim because its calculations do not account for the uncompensated overtime provided by its general counsel. Otherwise, the cost data appears reasonable and we use it in our recalculation of the total reimbursable costs described below.

In seeking reimbursement of the general counsel's salary costs via its alternative request for reimbursement, e-LYNXX identified the time its general counsel spent on the protest and calculated an hourly rate for the general counsel's time assuming a 40-hour work week. The company then multiplied the hourly rate derived times the total hours that the general counsel worked on the protest, to obtain a total of \$13,664.30 in salary costs.

In reviewing this request, we noted that the general counsel, on occasion, worked more than 40 hours per week, but was not provided additional compensation for those hours. Where a salaried employee works uncompensated overtime hours, an hourly rate charged for that employee's time may not accurately reflect the associated cost to his employer. The Pevar Co.—Costs, B-242353.3, Sept. 1, 1992, 92-2 CPD ¶ 144 at 3-4. In such cases, the cost to the employer for a given task is determined by considering the hours worked by the employee on the task during a given week in proportion to the total hours worked by that employee for that week. The employer's total weekly salary cost for the employee is then multiplied by the percentage of time that the employee spent on the task during the week. The resulting product represents the cost to the employer for the time worked on the task during that week. Id.

² During the course of this proceeding, e-LYNXX elaborated on the description of its oral agreement with its general counsel by characterizing the agreement as a "contingent performance bonus." First Addendum to the Request for Reimbursement (Mar. 11, 2004), at 2. It is unclear whether e-LYNXX and its general counsel agreed to an amendment to the terms of the alleged agreement, or are only providing a more detailed description of those terms. Nonetheless, given our conclusion that there is not sufficient evidence to support this claimed agreement, we also reach no conclusions about the propriety of this variation of the protester's contingent fee arrangement.

Using this approach, we recalculated the general counsel's salary costs. We began with the weekly cost to e-LYNXX of employing its general counsel. After requesting additional information about the total hours the general counsel worked each week, we calculated the percentage of time spent each week on the protest by dividing the total protest-related hours by the total hours worked for that week. Multiplying the weekly salary cost by the percentage of time worked on the protest each week generates a more accurate cost to e-LYNXX of having its general counsel pursue the protest, which, in this case totals \$11,142.19.³

As a final matter, GPO argues that our Office should deny e-LYNXX's request for reimbursement on the basis that the company included a false statement in its claim. GPO reaches this conclusion by reasoning that, in order to conclude that e-LYNXX incurred employee costs for the work performed by its general counsel, our Office must first conclude that e-LYNXX submitted false statements about employing its general counsel as outside counsel. In our view, no such conclusion is warranted here. Although we agreed with GPO that there was insufficient evidence in this record to find that the claimed oral agreement existed, we do not agree that our finding requires a corresponding conclusion that the claim rises to the level of a false statement.

In conclusion, we recommend that, in addition to the costs that the agency has previously reimbursed e-LYNXX, the protester be reimbursed \$11,142.19 for the time spent on this protest by its general counsel.

Anthony H. Gamboa
General Counsel

³ We have made slight corrections to the protester's request based on the following minor errors or discrepancies in e-LYNXX's documentation: (1) a discrepancy between the protest hours worked on October 10, which e-LYNXX initially reported as 2.8 hours, and later reported as 0.5 (we used the later report as the correct figure); (2) a discrepancy between the protest hours worked on October 16, for which e-LYNXX initially reported 0.5, but later no hours (we assumed the later report was correct); (3) an addition error in adding 6.7 protest hours and 1.7 other hours resulting in an understatement of the total hours for the week of November 2 by 0.4 hours (corrected total is 47.2 hours); and (4) an addition error resulting in an understatement of the total hours for the week of November 30 by 8 hours (corrected total is 48 hours). Cost Claim, exh. 3, attach., Time Summary, at 4; Second Addendum to Cost Claim, exh. 16, Second Declaration of e-LYNXX's General Counsel, at 8, 9.